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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~953~~. 111

WILLIAM M. FERGUSON, Attorney General for the State of Kansas, and KEITH SANBORN, County Attorney for the County of Sedgwick, State of Kansas,
Appellants,

VS.

FRANK C. SCRUPA, d/b/a CREDIT ADVISORS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM.

LAWRENCE WEIGAND,
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 953.

WILLIAM M. FERGUSON, Attorney General for the State of Kansas, and KEITH SANBORN, County Attorney for the County of Sedgwick, State of Kansas,
Appellants,

vs.

FRANK C. SCRUPA, d/b/a CREDIT ADVISORS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM.

Pursuant to Rule 16, Paragraph 1(c) of the revised rules of this court the Appellee, Frank C. Scrupa, d/b/a Credit Advisors, moves that the judgment of the District Court be affirmed on the ground that the questions raised by Appellants are so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE.

This is a direct appeal from a judgment of a statutory three-judge district court entered November 27, 1961, pursuant to 28 U.S.C.A. 1331, 1332, 2281, 2284 and 2201, which set aside and permanently enjoined enforcement of an act passed by the 1961 Session of the Kansas Legislature, Senate Bill 366 (now known as Kansas G.S., 1961 Supplement, 21-2464), as a violation of the rights of the Appellee guaranteed by the Due Process Clause of the United States Constitution. The Act was also attacked on the ground that it denied plaintiff the equal protection of the laws and impaired the obligations of existing contracts contrary to the Fourteenth Amendment to the Constitution of the United States, Section 1, and contrary to Article I, Section 10 of the United States Constitution and further, that it was violative of the Constitution of the State of Kansas, Article II, Section 16, which provides "No bill shall contain more than one subject which shall be clearly expressed in its title * * *."

The content and substance of Senate Bill 366 are practically identical with the content and substance of a prior act from Pennsylvania. A different label was used, the Kansas act substituting "Debt Adjusting" for "Budget Planning". The Pennsylvania act, one year and seven months prior to its almost verbatim adoption by the Kansas legislature was stricken down as unconstitutional by the Pennsylvania Court in *Commonwealth* v. *Stone,* (decided November 11, 1959) 155 A.2d 453, 191 Pa. Super. 1117.

The Kansas Act (Senate Bill 366, G.S., 1961 Supp., 21-2464. An Act Concerning the Business of Debt Adjusting; Making Certain Acts Unlawful and Prescribing Penalties Therefor:

Debt Adjusting; Unlawful Acts; Penalty. For the purpose of this act, "debt adjusting" *means the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the* debt adjusting *business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon. Whoever engages in the business of* debt adjusting shall be *guilty of a misdemeanor and upon conviction thereof shall be* punished by *a fine of not more than five hundred dollars ($500)*, or by *imprisonment* in the county jail not exceeding six (6) months, *or* by *both* such fine and imprisonment: *provided*, that *the provisions of this act shall not apply to those situations involving debt adjusting as herein defined incurred incidentally in the lawful practice of law in this state. (L. 1961, ch. 190, § 1; June 30.)*

[Emphasis supplied.]

The Pennsylvania Act. The Act of Assembly, 1939, June 24, P.L. 872, Section 897, Amended 1955, Nov. 30, P. L. 755, Section 1; 18 P. S. 4897, provides:

(a) "Budget Planning", as used in this section, *means the making of a contract, express or implied, with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the* budget planning *business, who shall, for a consideration, distribute the same among certain specified creditors in accordance with a plan agreed upon.*

(b) *Whoever engages in the business* of budget planning is *guilty of a misdemeanor, and upon conviction thereof, shall be* sentenced to pay *a fine of not more than five hundred dollars ($500.-00)* or undergo *imprisonment* of not more than (1) year, *or both, provided that the provisions of this act shall not apply to those situations involving budget planning as herein defined incurred incidentally in the practice of law in the Commonwealth.*

Appellee is a resident of the State of Nebraska and he conducts in Wichita, Kansas, a business which involves "debt adjusting" as defined by the Kansas Act which attempted to make this a crime. The Court below heard testimony that the Appellee had spent more than twenty thousand dollars in his business in Kansas and had in force a substantial number of existing contracts with debtors which involved the handling of an average of fifteen thousand dollars per month in accounts. His employees are bonded to prevent loss against embezzlement or dishonesty. His service consists of setting up a budget for the debtor and entering into a contract with the debtor by which he agrees to receive from the debtor a specified sum periodically and, in turn, to distribute that sum to the persons specified by the debtor, less a fee which varies from 5% to 9% of the amount involved. The business has been carried on by reputable firms in this country for over a quarter of a century and similar businesses are operated in most of the metropolitan areas of the country. The plaintiff offers mere financial budgeting service only, does not attempt to advise debtors as to any of their legal rights and he does not attempt to compromise or discount the indebtedness.

The court below concluded that the business was a lawful business and that the act was prohibitory in character and, even if construed as regulatory, was unreasonable and unwarranted, it being undisputed at the trial that the enforcement of Senate Bill No. 366 would put the plaintiff out of business.

ARGUMENT.

This decision is not only consistent with but was compelled by well established concepts of constitutional law.

A state cannot exclude a person from an occupation in a manner that contravenes the due process or equal protection clause of the Fourteenth Amendment. *Schware* v. *Board of Bar Exam. of State of N. M.*, 353 U.S. 232, 77 S. Ct. 752, 756; *Dent* v. *State of W. Va.*, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623.

Appellee's employment is "property" and his freedom to practice his chosen profession is "liberty". "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of" the Constitution. *Greene* v. *McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 1411.

The Fourteenth Amendment provides:

> * * * "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful business such as that under review cannot be upheld consistent with the Fourteenth Amendment. "Under that amendment, nothing is more clearly settled than that it is beyond the power of the state, 'under the guise of protecting the public, arbitrarily to interfere with private business or

prohibit lawful occupations *or impose unreasonable and unnecessary restrictions upon them'*". *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 278, 52 S. Ct. 371, 374. (Emphasis supplied). Similar expressions may be found in *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 44 S. Ct. 412, 413; *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402, 46 S. Ct. 320, 323; *Louis P. Liggett* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 47, 49.

The police power of the State must be exercised for an end which is in fact public and "the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive." *Treigle* v. *Acme Homestead Association*, 297 U.S. 189, 52 S. Ct. 408, 411.

We fail to see the justification for extended argument on Appellants' attempt to upset a ruling compelled by these principles which was the same conclusion reached by the Pennsylvania Court dealing with substantially the same statute. There are no contrary decisions involving substantially identical statutes.

The Pennsylvania court in the Commonwealth case predicated its decision to some extent upon the case of *Adams* v. *Tanner*, 244 U.S. 590, 37 S. Ct. 662, which decision was endorsed and applied to strike down another Kansas legislative enactment by the Kansas Supreme Court as late as May 14, 1960, in *Gilbert* v. *Matthews*, 186 Kan. 672, 676, 352 P.2d 58; there the court said:

> "The right to regulate and license the business does not however include the right to prohibit it directly or in effect, to adopt unreasonable and unfa r regulations, or such regulations as would be oppressive or highly injurious to the business."

At Page 681 the Kansas Supreme Court cited with approval *Adams* v. *Tanner*, and stated in striking down an

unreasonable regulation consisting of an act affecting the auction business that:

> "Abuses may, and probably do, grow up in connection with the auction business and are *adequate reason for regulation, but this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way.*" (Emphasis supplied).

The Equal Protection of the law required the Court below to apply the same test to this Kansas Legislation which has been uniformly applied to similar regulations by the Kansas Supreme Court.

One of the bases upon which Appellants now seek a reversal of the court below is a hypothetical postulate that plaintiff's business constitutes the practice of law and hence the enactment does not restrict the privilege or immunity of a citizen of the United States (Jurisdictional Statement, Page 10). Thus construed, the act fails to meet the minimum standards of the Kansas Constitution which requires that the subject of any Kansas legislative act "shall be clearly expressed in its title", Article II, Section 16, of the Kansas Constitution (Emphasis supplied).

The title to the Act here in question reads:

> "An Act concerning the *business* of debt adjusting; making certain acts unlawful and prescribing penalties therefor." (Emphasis supplied).

May we remind Appellants that the practice of law has always been regarded as a profession not a *business*.

There is nothing in the title which would advise anyone that it was concerned with the practice of law or that it was an act defining, in whole or in part, action constituting the unauthorized practice of law.

Therefore, if the act is "given the force and effect contended by the Appellant" it "clearly would be outside of and foreign to the title of the bill, thus rendering the act unconstitutional and void". (*Manor Baking* v. *City of Topeka*, 170 Kan. 292, 298. See also *Capitol Gas and Electric Co.* v. *Boynton*, 22 P.2d 958, 137 Kan. 717, 726; *State ex rel.* v. *Kerchner*, 182 Kan. 622, 625; *State ex rel.* v. *City of Wichita*, 335 P.2d 786, 184 Kan. 196).

Also, *School District, Joint No. 71*, v. *Throckmorton*, 189 Kan. 259, 260, ... P.2d ....., decided January 27, 1962, where the Supreme Court of Kansas said:

> "2. Section 29 of the act would seem to contain matter not covered in the title of the act since it appears that the unified school districts referred to in Section 29 are districts which are not organized 'by a vote of the people' as the title provides. Thus Article 2, Section 16 of the State Constitution would appear to be violated."

Certainly "due process" requires compliance with the minimum standards of the Kansas Constitution relating to legislative enactments. And is not this equally true where the questioned statute prescribes penalties and imprisonment for heretofore lawful acts?

Not only is the practice of law not mentioned in the title, but it is difficult to conceive what rationale would permit a legislature enacting a regulation of or enlarging a definition of, the practice of law to provide for a fine and imprisonment to a licensed attorney engaged exclusively in that act.

We respectfully submit that Senate Bill 366 was not intended as an enlargement of the definition of or a regulation of the practice of law, but a contrary determination is fatal to its alleged validity because of the constitutional

defect in the title, which obviously obscured the purpose and substance of the act as now contended for by appellants.

A Federal Court acquiring jurisdiction because a federal question is involved, may decide non-federal questions which result in the statute being declared unconstitutional. Resort to a federal court may be had without first exhausting the judicial remedies of state courts. *Lane* v. *Wilson*, 307 U.S. 268, 59 S. Ct. 872, 875; *Bacon* v. *Rutland R.R.*, 232 U.S. 134, 34 S. Ct. 283, 58 L. Ed. 538; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U.S. 196, 44 S. Ct. 553, 68 L. Ed. 975; *Silver* v. *Louisville & N. R. Co.*, 213 U.S. 175, 29 S. Ct. 451, 455.

Appellee pointed out to the court below the numerous situations where one citizen relies upon another or a firm or establishment to do that which, under the provision of this act, Senate Bill 366, is forbidden as "debt adjusting" and is asserted to be a crime. For example, an ordinary business man hiring a professional accountant could not make an agreement with the accountant whereby the facilities of the accountant's office could be used to pay or distribute the business man's money to obligations or accounts through the facilities of the accountant's office out of funds periodically furnished by the business man. The depositor in a bank could not give written authority to the bank to pay out on drafts drawn by the depositor's specified creditors, periodic payments for such items as insurance premiums, rental payments and mortgage and car payments which the bank would deduct from the depositor's account for a charge. The typical escrow contract agreement calling for periodic payments through an escrow agent to two or more creditors are forbidden by the act, where, for example, the creditors would be a mortgagee and the seller who is carrying back a portion of the balance of the purchase price. While forbidding such lawful business prac-

tices and activities, the act, however, leaves free small loan companies to make debt consolidation loans for 36% interest to an embarrassed debtor and does not prevent such a loan company from distributing the proceeds of the loan to specified creditors. Neither does it forbid or regulate the giving of financial advice or advising for a consideration concerning a budget plan. What is forbidden is the making of a contract providing for an agent's periodic distribution of a principal's money to persons specified by the principal.

We respectfully submit that the majority of the court below correctly determined that the distribution of a principal's money to specified creditors periodically is a lawful business subject to reasonable regulation but not prohibition and is not the practice of law.

That Appellants contend (Jurisdictional Statement, Page 7) that "the issues involved in this appeal are similar, if not identical, with those raised in various state courts" and cite *Home Budget Service* v. *Boston Bar Association*, 335 Mass. 228, 139 N.E. 387 and *American Budget Corportation* v. *Furman*, 67 N.J. Super. 134, 170 A.2d 63. These two cases did not involve statutes substantially identical to the one in question here and the resulting conclusions of those courts thus do not directly conflict with the decision below.

Apparently neither the Massachusetts nor the New Jersey act violated the respective state constitutions with respect to the title or otherwise. With respect to the New Jersey case, the majority opinion below pointed out: "It is sufficient to say that it differed in many particulars from the Pennsylvania case and the act which we have before us here."

The only question decided by the Massachusetts case was the power of the legislature to pass an act enlarging

by statute the definition of what constitutes the practice of law and providing a penalty for such defined act constituting the unauthorized practice of law; and the act was so designated. There the statute specifically provided that certain acts (including elements not in the Kansas act) "shall be deemed to be the practice of law".

Appellee does not here contend that it is beyond the power of the State Legislature to define the practice of law —that is not here involved. We merely assert that any act of the Legislature that violates the Kansas Constitution is not enforceable against a citizen when it deprives him of a right otherwise available to him, thus depriving him of property without due process of law.

The unsubstantial nature of appellants' contentions can also be illustrated by the jurisdictional statement, Page 7:

> "Treatment and comment in other jurisdictions on the problem of debt adjusting is to be considered in weighing the *reasonableness* and appropriateness of the action taken by the Kansas Legislature". (Emphasis supplied).

If so, consideration of the Oklahoma statute concerning this subject matter discloses that it makes a lawyer a criminal who engages in the act of debt pooling and exempts only retail merchants trade associations and non-profit organizations formed to collect accounts and exchange credit information (Okla. Stat. Ann., Tit. 24, Secs. 15-18).

Appellants make reference in their jurisdictional statement to such eminent legal publications as Good Housekeeping and Reader's Digest to attempt to discredit Appellee's business. But they have consistently failed to relate the Kansas Act to any claimed abuses in this State by Appellee or anyone else or to show how merely forbidding the periodic distribution of money by the "debt adjuster" will

rid the state of claimed abuses in rendering legal advice and compromising indebtedness (which Appellee testified, without contradiction, he did not do) and concerning which the act is silent.

It is to be noted that the Appellant Attorney General in the trial court did not choose to present oral argument or submit formal briefs on the merits of the case but limited actual argument to his contention that he was not a proper party defendant. That issue was listed as a question in the Notice of Appeal (Paragraph III G) but is not included in the "Questions Presented" in the Jurisdictional Statement and hence will not be considered by this Court. Rule 15 (c) (1).

Another illustration of the unsubstantial character of appellants' contentions is illustrated by the jurisdictional statement, Page 3, Questions Presented No. 4: "* * * By judicial act the Supreme Court of Kansas, as long ago as 1945, declared the business of so-called debt adjusting to be the unauthorized practice of law", citing *Depew* v. *Wichita Association of Credit Men,* 142 Kan. 403, 49 P.2d 1041. A portion of that opinion is quoted (Page 12—Jurisdictional Statement) *"the liquidation of a business* by this method, contracts and *forms used and the advice given* are services which require legal skill and knowledge and constitutes the practice of law", 142 Kan. 410, 49 P.2d 1045 (Emphasis supplied). Obviously the definition of debt adjusting contained in the act in question, does not in any way encompass the elements concluded by that decision to constitute the practice of law. The distinction is consistent with the fact that when a debt adjusting bill was proposed in New York, a committee of the New York City Bar disapproved, saying: "Basically, the subject lies outside the traditional concept of the practice of law." Bulletin No. 3 of the Association of the Bar of the City of New York, p. 89, February 13, 1956.

The Appellants criticize the Pennsylvania opinion in *Commonwealth* v. *Stone*, *supra*, because it cited *Adams* v. *Tanner*, 244 U.S. 590, with approval. It is not necessary to rely on *Adams* v. *Tanner* to summarily affirm the decision below, because the act in question blatantly fails to meet the minimum standards of the Kansas Constitution and thus a Nebraska citizen is deprived of property without due process and is denied the equal protection of the laws.

A general review of the decisions of this court in the field of due process discloses that the case of *Adams* v. *Tanner* has never been overruled. Later cases have restricted the application of the rule to cases where a clear showing can be made that a statute in effect prohibits an otherwise lawful business or attempts to regulate that business in an unreasonable, arbitrary or oppressive manner. This is consistent with the conclusions of the Court below and extended analysis of the cases would seem pointless.

As we have previously pointed out, however, the Kansas Supreme Court, as late as May 14, 1960, cited *Adams* v. *Tanner* with approval and declared unconstitutional a Kansas statute failing to meet the test contained in the *Adams* case. *Gilbert* v. *Matthews*, *supra*, 186 Kan. 672, 352 P.2d 58. Appellants apparently would like to have a different test applied to this Kansas statute when challenged by Appellee, a Nebraska resident. Obviously, this Court does not have to agree with the Kansas Supreme Court in matters involving the Federal Constitution, but the contended-for inconsistency in determining the validity of Kansas statutes illustrates the lack of any compelling reason for this Court to hear extended argument aimed at a reversal of a judicial determination consistent with the test so recently held to be applicable to Kansas statutes by the highest Court of that State whose enactment is here involved.

We respectfully submit that the decision below is correct and should be affirmed without further argument.

Respectfully submitted,

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